



**REPUBLIC OF MALAWI  
IN THE HIGH COURT OF MALAWI  
LILONGWE DISTRICT REGISTRY  
Personal Injury Cause Number 35 of 2020**

**BETWEEN:**

**MERCY PANJE.....CLAIMANT**

**AND**

**MR KENNETH NDOVIE.....DEFENDANT**

<b>CORAM:</b>	<b>C MANDALA:</b>	<b>ASSISTANT REGISTRAR</b>
	Mapemba-Chikopa:	Counsel for Claimant of Winlaw & Ndau
	Defendant:	Unrepresented
	C Zude:	Court Clerk

**ASSESSMENT OF DAMAGES**

**CM MANDALA, AR:**

**INTRODUCTION AND BACKGROUND**

This is an order for assessment of damages pursuant to a Judgment in Default issued on 25<sup>th</sup> March 2020. The Defendants are liable for: damages for pain and suffering, loss of amenities of life, disfigurement, medical expenses, special damages of K22,000, and costs of the action. The hearing on Assessment of Damages was conducted on 9<sup>th</sup> March 2021.

This matter arose on 13<sup>th</sup> December 2017 when the Claimant was a passenger in a minibus owned by the Defendant. The minibus was involved in a car accident along the Kasungu-Lilongwe road. The Defendant's driver lost control of the minibus and it hit the offside dirty verge causing it to overturn.

**EVIDENCE**

The Claimant was her own and only witness. The Claimant's evidence was unopposed. She adopted her witness statement as evidence in chief. It states:

- 1. I am the Claimant in this matter and I make this statement in my personal capacity. I refer to a copy of my passport exhibited hereto and marked as "MP 1."*
- 2. Statements made herein are within my personal knowledge and information obtained from my lawyers.*
- 3. On 13 December 2017 or thereabout, I was coming from the United Republic of Tanzania where I had gone to order some goods for resale here in Malawi.*
- 4. I boarded motor vehicle registration number KA 8089 Nissan Caravan (the "Motor Vehicle") at Mzuzu together with other passengers and we were to travel to Lilongwe.*

5. *I repeat the immediately preceding paragraph and state that the said motor vehicle was at the material time being driven by one Mr Daylous Kishombe (the “Driver”), who was in the employ of the Defendant.*
6. *On our way to Lilongwe, when we arrived at Chakalamba. Village (near Mtengowanthena Hospital) the said motor vehicle was involved in an accident after the driver had lost control of the said motor vehicle and I sustained injuries as a consequence thereof namely:*
  - 6.1 *Hedge compression fracture of spine; and*
  - 6.2 *Dislocation of the right index finger (with a permanent incapacity of 30%.) I refer to the medical report exhibited hereto and marked as “MP 2.”*
7. *After the accident occurred, I was taken to Mtengowanthena Hospital for treatment but I was subsequently referred to Kamuzu Central Hospital owing to the severity of the injuries I sustained in the said accident.*
8. *I was admitted at Kamuzu Central Hospital for about 4 weeks.*
9. *After I began recovering, I went and obtained a police report and inquiries made by the police revealed that the accident was caused by the driver’s negligence. I refer to the abstract of the police report exhibited hereto and marked as “MP 3.”*
10. *I have healed with difficulties: I cannot sit down for long hours or walk long distances without feeling pain.*
11. *After the said accident, my right index finger gets numb sometimes and I cannot bend to do some basic house chores such as mopping, carrying water, washing clothes (among others) as I used to before the said accident.*
12. *I periodically still take pain killers to relieve the general body pains I feel as a result of the said accident.*
13. *Before the said accident occurred I used to go to Tanzania to order goods for resale here in Malawi and after the said accident I am unable to travel long distances because of the pain I feel when seated for long hours; I have stopped plying the said trade because of the injuries sustained.*
14. *The said motor vehicle appeared to have had a valid insurance at the time of the accident but it subsequently turned out that the said insurance was non-existent after I had commenced a claim, through my lawyers, Messrs Robert and George against the purported insurers. I refer to the Affidavit of Defence of Messrs Prime Insurance Company Limited filed by Messrs Wilkinson and Associates denying liability exhibited hereto and marked as “MP 4.”*
15. *I then instructed my lawyers to institute a suit against the Defendant who is the registered and legal owner of the aforesaid motor vehicle and they proceeded to do so.*
16. *To date, I have not been compensated for the injuries I sustained hence the assessment.*
17. *I therefore claim damages for pain and suffering, loss of amenities and disfigurement suffered as a result of the said accident.*
18. *I also claim costs incurred in these proceedings.*
19. *I believe that the facts stated in this witness statement are true.*

**SUBMISSIONS BY COUNSEL FOR THE CLAIMANT**

Counsel for the Claimant filed written submissions in support of the application. Counsel avers that the extremity of the Claimant’s injury and the devaluation of the Kwacha would attract a total award of K7,500,000.00 as compensation. Counsel for the Claimant cited the following comparable awards in support:

- ***Smith v Prime Insurance Company Limited*** – Civil Cause Number 1242 of 2009 where the Claimant was awarded K5,000,000.00 for pain and suffering, loss of amenities, and disfigurement in August

2011. The Claimant sustained a fracture/ dislocation of vertebrae with quadriplegia, was confined to wheelchair, walked using a frame, and needed support standing and walking.

- **Kondowe v Bula and another** – Civil Cause Number 62 of 2008 where the Claimant was awarded K5,000,000.00 for pain and suffering, and loss of amenities of life on 14<sup>th</sup> January 2009. The Claimant had a spinal injury that resulted in paraplegia (complete loss of function) and was confined to a wheelchair for mobility.
- **Langson v Eastern Produce Malawi Limited** – Civil Cause Number 94 of 2012 where the Claimant was awarded K900,000.00 for pain and suffering, and loss of amenities of life on 31<sup>st</sup> August 2012. The Claimant’s distal phalanx of the left index finger was amputated.

### ASSESSMENT GUIDELINES

Damages for personal injuries are awarded for a Claimant’s pecuniary and non-pecuniary losses. The pecuniary losses include the loss of earnings and other gains, which the Claimant would have made had they not been injured, and the medical and other expenses which accrue from care and after-care of the injury. The non-pecuniary losses include pain and suffering, loss of amenities of life and loss of expectation of life. The principle underlining the award of damages is to compensate the injured party as nearly as possible as money can do it.<sup>1</sup>

Perfect compensation for a Claimant is unlikely. The Claimant, however, is entitled to fair and adequate compensation.<sup>2</sup> Since it is difficult to assess damages involving monetary loss, courts resort to awarding conventional figures guided by awards made in similar cases and considering the money value. Lord Morris buttresses this contention in **West v Shepherd**<sup>3</sup> by stating: ‘*money cannot renew a physical frame that has been battered and shattered. All judges and courts can do is to award a sum which must be regarded as giving reasonable compensation.*’

The mode of assessment of damages requires the court to consider comparative awards of a similar nature. In doing so, regard must be had for fluctuations in the value of the currency. The court should make an award that is equal with the value of the currency at the time the award is made. In **Malamulo Hospital (The Registered Trustees) v Mangani**<sup>4</sup>, the Supreme Court states: “*It is, therefore, recognised by the courts that awards of comparable injuries should be comparable. This is done by looking at previous awards of similar cases and adjusting the award according to the fall of the value of the money.*” In **Tionge Zuze (a minor, through A.S. Zuze) v Mrs Hilda Chingwalu**,<sup>5</sup> the Court states: “*Where a claim relates to non-monetary loss in respect of which general damages are recoverable it is not possible to quantify the loss in monetary terms with mathematical precision. In such cases courts use decided cases of a comparable nature to arrive at an award.*” In **Steve Kasambwe v SRK Consulting (BT) Limited** Personal Injury Cause Number 322 of 2014 (unreported), the High Court states thus: ‘*In such situation, when deciding the new cases, the court must take into account the life index, i.e. cost of living and the rate of inflation and the drop-in value of the currency. The court must therefore not necessarily follow the previous awards but award a higher sum than the previous cases.*’

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<sup>1</sup> See **Cassel and Co v Broom** [1972] AC 1027. See also **Tembo v City of Blantyre and The National Insurance Co Ltd** – Civil Cause No. 1355 of 1994 (unreported).

<sup>2</sup> **British Commission v Gourley** (1956) AC 185.

<sup>3</sup> **West v Shepherd** (1964) AC 326 at 346.

<sup>4</sup> [1996] MLR 486.

<sup>5</sup> Quoting from **HQ Chidule v Medi** MSCA 12 of 1993.

## COMPENSATION

### *Pain and Suffering*

The word ‘pain’ connotes that which is at once felt upon the nerves and brain, be it related to the accident or resulting from medical treatment needed by the accident while ‘suffering’ includes fright, fear of future disability, humiliation, embarrassment, and sickness. See: *Ian Goldrein et al, Personal Injury Litigation, Practice and Precedents* (Butterworths, 1985) 8 and *City of Blantyre v Sagawa* [1993] 16 (1) MLR 67 (SCA).

The Claimant herein sustained ‘wedge compression fracture of L2 spine, and MCP dislocation right index finger’ as per the medical report. The immediate treatment she received was ‘reduction of MCP joint of index finger /rt and lumbar brace.’ In viva voce, the Claimant told the court that she sustained a spinal cord injury and dislocation of the thumb. At the hospital, she underwent an x-ray and was given a brace to support her back. The brace also allowed her to sit upright. She has been using the brace for a year.

Counsel for the Claimant cited comparable awards of K5,000,000.00, K5,500,000.00 and K900,000.00 for all heads awarded in 2011, 2009, and 2012 respectively See: *Smith v Prime Insurance Company Limited, Kondowe v Bula and another, and Langson v Eastern Produce Malawi Limited* (cited above).

Based on these awards, **this court awards the sum of K2, 500,000.00 as damages for pain and suffering.**

### *Loss of Amenities of Life*

The expression ‘loss of amenities of life’ simply means loss of faculties of pleasures of life resulting from one’s injuries. Damages for loss of amenities of life are awarded for the fact that the plaintiff is simply deprived of the pleasures of life, which amounts to a substantial loss, whether the plaintiff is aware of the loss or not. See: *Poh Choo v Camden and Islington Area Health Authority* [1979] 2 All ER 910 and *City of Blantyre v Sagawa* [1993] 16(1) MLR 67 (SCA) at 72.

As a result of this incident, the Claimant may develop osteoarthritis. She also told the Court in viva voce, that she has to keep taking painkillers, she cant sit for long periods of time and she cant walk long distances. Further, the Claimant would travel to and from Tanzania as she was involved in cross border trade. Due to the injuries sustained she can no longer ply her trade as she would travel by bus and she cant sit for long periods of time.

Counsel for the Claimant cited comparable awards of K5,000,000.00, K5,500,000.00 and K900,000.00 for all heads awarded in 2011, 2009, and 2012 respectively See: *Smith v Prime Insurance Company Limited, Kondowe v Bula and another, and Langson v Eastern Produce Malawi Limited* (cited above).

Based on these awards, **this court awards the sum of K1,500,000.00 as damages for loss of amenities of life.**

### *Disfigurement*

In the matter of *James Chaika v NICO General Insurance Co Ltd* the High Court stated that ‘*Disfigurement is not a matter to be taken lightly and casually as it is something that one has to permanently live with.*’

In *Nyirenda v Moyo and other*, the claimant was awarded the sum of K500,000.00 as damages for disfigurement in 2018. In the matter of *Austin Julius v Rasika Gunawerdana & General Alliance Insurance Limited* – Personal Injury Cause Number 316 of 2014 the court awarded the Claimant K700,000.00 for

disfigurement. In the matter of *Grem Livingstone Chiweza v Phoster Kachali & Prime Insurance Company Limited* Civil Cause Number 429 of 2017, this Court awarded the Claimant K650,000.00 as compensation for disfigurement on 4<sup>th</sup> March 2021.

Following the sentiments above, **the Claimant is hereby awarded K700,000.00 as damages for disfigurement.**

*Special Damages*

Special damages are such as the law will not infer from the nature of the course - *Stros Bucks Aktie Bolag v Hutchinson* (1905) AC 515. In determining the natural consequences, the court considers if the loss is one which any other claimant in a like situation will suffer – **McGregor on Damages** p23 para 1-036. A Plaintiff who claims special damages must therefore adduce evidence or facts which give satisfactory proof of the actual loss he or she alleges to have incurred. Where documents filed by the Plaintiff fail to meet this strict proof then special damages are not awarded – *Wood Industries Corporation Ltd v Malawi Railways Ltd* [1991] 14 MLR 516.

The Claimant herein was awarded the sum of K22,000.00 being the cost of medical and police reports. No evidence was provided to the court to prove that this amount was indeed spent. Though specifically claimed, special damages were not proved during trial and/or submissions. No award will be made under this head.

DISPOSAL

The Claimant is therefore awarded K2,500,000.00 for pain and suffering; and K1,500,000.00 for loss of amenities of life; K700,000.00 for disfigurement and costs of the action (to be taxed by the court). **The Claimant's total award is K4,700,000.00 (four million seven hundred thousand kwacha).**

Leave to appeal is granted. Each party is at liberty to appeal to the Supreme Court of Appeal within the requisite time frames.

Ordered in Chambers on the 9<sup>th</sup> day of April 2021 at the High Court, Civil Division, Lilongwe.



C Mandala

**ASSISTANT REGISTRAR**